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ARTICLE

Benefits of Judicial Specialization in Environmental Law: The Land and Environment Court of New South Wales as a Case Study

BRIAN J. PRESTON*

I. INTRODUCTION

Environmental problems are polycentric and multidisciplinary. The first law of ecology is that everything is connected to everything else.¹ The scale of environmental problems is such as to require a holistic solution. Environmental problems can have wide, even trans-boundary, impacts. Examples include climate change, forest fires, and hazardous waste.

Tackling environmental problems involves implementing ecologically sustainable development. The original concept of sustainable development articulated in the Brundtland Report is “development that meets the needs of the present without compromising the ability of future generations to meet their own

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1. BARRY COMMONER, *THE CLOSING CIRCLE: CONFRONTING THE ENVIRONMENTAL CRISIS* 33 (1972).

needs.”² In Australia, the adjective “sustainable” is qualified by “ecologically” to emphasize the necessary integration of economy and environment.³ Ecologically sustainable development involves a cluster of elements or principles, including the principle of sustainable use; the principle of integration (of economic, social and environmental considerations in decision making); the precautionary principle; principles of equity, both inter- and intragenerational equity; the principle that the conservation of biological diversity and ecological integrity should be a fundamental consideration; and the principle of the internalization of environmental costs (in decision-making).⁴

The achievement of ecologically sustainable development depends on the commitment and involvement of all branches of government—the legislature, executive and judiciary—as well as other stakeholders. Klaus Toepfer, the then-Executive Director of the United Nations Environment Program (UNEP), stated in his message to the UNEP Global Judges Program:

Success in tackling environmental degradation relies on the full participation of everyone in society. It is essential, therefore, to forge a global partnership among all relevant stakeholders for the protection of the environment based on the affirmation of the human values set out in the United Nations Millennium Declaration: freedom, equality, solidarity, tolerance, respect for nature and shared responsibility. The judiciary plays a key role in weaving these values into the fabric of our societies.

The judiciary is also a crucial partner in promoting environmental governance, upholding the rule of law and in ensuring a fair balance between environmental, social and

2. U.N. Secretary-General, *Report of the World Commission on Environment and Development: Our Common Future*, 54, U.N. Doc. A/42/427, Annex I (Aug. 4, 1987).

3. GERRY BATES, *ENVIRONMENTAL LAW IN AUSTRALIA* 124 ¶ 5.15 (6th ed. 2006).

4. See generally Brian J. Preston, *The Role of the Judiciary in Promoting Sustainable Development: the Experience of Asia and the Pacific*, 9 *ASIA PAC. J. ENVTL. L.* 109 (2005); see also Brian J. Preston, *Ecologically Sustainable Development in the Context of Contaminated Land*, 25 *ENVTL. & PLAN. L.J.* 164 (2008).

developmental considerations through its judgements [sic] and declarations.⁵

The judiciary has a role to play in the interpretation, explanation and enforcement of laws and regulations. As Kaniaru, Kurukulasuriya and Okidi state:

The judiciary plays a critical role in the enhancement and interpretation of environmental law and the vindication of the public interest in a health [sic] and secure environment. Judiciaries have, and will most certainly continue to play, a pivotal role both in the development and implementation of legislative and institution regimes for sustainable development. A judiciary, well informed on the contemporary developments in the field of international and national imperatives of environmentally friendly development, will be a major force in strengthening national efforts to realize the goals of environmentally-friendly development and, in particular, in vindicating the rights of individuals substantively and in accessing the judicial process.⁶

Increasingly, it is being recognized that a court with special expertise in environmental matters is best placed to play this role in the achievement of ecologically sustainable development. The Land and Environment Court of New South Wales is an example of a specialist environment court. It was the first specialist environment court established as a superior court of record in the world and provides an instructive case study.

This article first provides an outline of the Court, explaining its history and the purpose of its establishment, its comprehensive jurisdiction, its caseload and the roles of court personnel who exercise the jurisdiction of the Court. Secondly, this article examines how the Court is moving towards functioning as a multi-door courthouse with an array of dispute

5. U.N. ENVIRONMENT PROGRAMME [UNEP] GLOBAL JUDGES PROGRAMME at v (2005), *available at* http://www.unep.org/publications/search/pub_details_s.asp?ID=3747.

6. Donald Kaniaru et al., *UNEP Judicial Symposia on the Role of the Judiciary in Promoting Sustainable Development* 22 (1998) (paper presented to the Fifth International Conference on Environmental Compliance and Enforcement), *available at* <http://www.inece.org/5thvol1/lal.pdf>.

resolution services under one roof. Thirdly, the Court is under a duty to facilitate the just, quick and cheap resolution of the real issues in proceedings. This article elaborates on these concepts and discusses the means the Court employs to achieve this goal. Fourthly, this article explains how the Court measures its performance in achieving the three objects of court administration: equity, efficiency and effectiveness. Finally, this article brings the discussion together by isolating at least a dozen benefits to the system of justice that have been generated by the establishment and operation of the Court.

II. LAND AND ENVIRONMENT COURT IN OUTLINE

A. Australia's federal system

Australia has a federal system of government. The responsibility for management and protection of Australia's environment is split between the Commonwealth of Australia and each of the States that comprise the Commonwealth. New South Wales is one of the States. The Commonwealth can only make laws pursuant to a particular power in the Australian Constitution. Although there is no express power to legislate on environmental matters, the Commonwealth is able to use one or more of its powers, which although not directly dealing with environmental matters, can be viewed in certain circumstances as properly enabling the Commonwealth to deal with environmental matters.⁷

The most commonly invoked sources of power are the trade and commerce power;⁸ the power to regulate foreign corporations and trading or financial corporations;⁹ and the external affairs power.¹⁰ The external affairs power enables the Commonwealth to implement international conventions to which Australia is a party. Partly pursuant to this power, the Commonwealth enacted

7. Brian J. Preston, *Institutional Roles in Establishing and Enforcing Environmental Priorities*, 10 UCLA PAC. BASIN L.J. 224, 224 (1991).

8. AUSTRALIAN CONSTITUTION s 51(i).

9. *Id.* s 51(xx).

10. *Id.* s 51(xxix).

the Environment Protection and Biodiversity Conservation Act¹¹ to implement a number of international conventions, including the Convention on Wetlands of International Importance especially as Waterfowl Habitat,¹² the Convention Concerning the Protection of the World Cultural and Natural Heritage,¹³ the Convention on International Trade in Endangered Species of Wild Flora and Fauna,¹⁴ and the Convention on Biological Diversity.¹⁵ These conventions provide matters of national environmental significance empowering Commonwealth action.

The States are not constitutionally limited in the way that the Commonwealth is limited; they have full power to enact any law on any environmental matter. For this reason, the bulk of the environmental legislation and policies is at the State level.¹⁶ In the event of an inconsistency between a State environmental law and a Commonwealth environmental law, the Commonwealth environmental law prevails.¹⁷

Because the bulk of environmental legislation is at the State level, the bulk of environmental litigation is conducted in the courts and tribunals of the States. Increasingly, these are specialized environmental courts and tribunals.¹⁸ The Land and Environment Court of New South Wales was the first specialized, environmental, superior court of record in the world. It provides a useful case study of a specialized environmental court.

11. *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (Austl.).

12. *See generally* Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Feb. 2, 1971, 996 U.N.T.S. 245.

13. *See generally* Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 1037 U.N.T.S. 151.

14. *See generally* Convention on International Trade in Endangered Species of Wild Flora and Fauna, Mar. 3, 1973, 993 U.N.T.S. 243.

15. *See generally* Convention on Biological Diversity, May 22, 1992, 1760 U.N.T.S. 79.

16. Robert J. Fowler, *Environmental Law and its Administration in Australia*, 1 ENVTL. & PLAN. L.J. 10, 11 (1984).

17. AUSTRALIAN CONSTITUTION s 109.

18. The main environmental courts and tribunals are: Planning and Environment Court (Queensland (Qld)); Land and Environment Court (New South Wales (NSW)); Victorian Civil and Administrative Tribunal (Victoria (Vic)); Resource Management and Planning Appeal Tribunal (Tasmania (Tas)); Environment, Resources and Development Court (South Australia (SA)); and State Administrative Tribunal (Western Australia (WA)).

B. The Court's place in the court hierarchy

The Australian judicial system is divided into inferior and superior courts. Inferior courts are lower in rank than superior courts and have limited jurisdiction. They are subject to control, and their decisions are subject to appeal to a superior court. In New South Wales, the Local Court (a magistrates' court) and District Court (a county court) are inferior courts. The Supreme Court of New South Wales, Industrial Relations Commission and Land and Environment Court are superior courts of record. The Supreme Court is a superior court of general jurisdiction while the other two are courts of specialized jurisdiction, being industrial relations and land, planning, environmental and resource matters respectively. Appeals from the superior courts lie to the New South Wales Court of Appeal, for civil matters, and the Court of Criminal Appeal, for criminal matters. These are the highest civil and criminal courts in the New South Wales judicial system. Appeals from these courts lie to the High Court of Australia, which is the highest court in Australia's judicial system. Appeals are only by special leave of the High Court and not as of right.¹⁹

C. History and purpose of establishment of the Court

The Land and Environment Court was established by the Land and Environment Court Act ("Court Act"),²⁰ which was assented to on December 21, 1979 but commenced operation on September 1, 1980. The Court Act was part of a package of environmental law reform, including the Environmental Planning and Assessment Act.²¹

The Court was established as a superior court of record. It is a specialist court that enjoys the benefit of a combined jurisdiction within a single court. The Court has a merits review function, reviewing decisions of government bodies and officials in a wide range of planning, building, environmental, and other matters. In exercising its merits review function, the Court

19. *Judiciary Act 1903* (Cth) s 35(2) (Austl.).

20. *Land and Environment Court Act 1979* (NSW) (Austl.).

21. *Environmental Planning and Assessment Act 1979* (NSW) (Austl.).

operates as a form of administrative tribunal. The Court also exercises judicial functions, as a superior court of record. Judicial functions include civil enforcement, judicial review, and summary criminal enforcement of a wide range of environmental laws, compensation for compulsory land acquisition and Aboriginal land claims. The Court also has appellate functions. It hears appeals against conviction or sentence for environmental offenses from the Local Court of New South Wales and appeals (on questions of law) from decisions of the non-legal members of the Court in merits review proceedings.

The Court was established with two principal objectives in mind: rationalization and specialization.²² In relation to rationalization, there was a desire for a “one-stop shop” for environmental, planning, and land matters. Prior to the establishment of the Land and Environment Court, the judicial system was irrational and inefficient. Planning and land matters were dealt with by an “uncoordinated miscellany” of tribunals and courts.²³ There was no environmental law as we now know it. Valuation, compulsory acquisition, and land matters were dealt with by a Land and Valuation Court, Valuation Boards of Review, and the Supreme Court (for title issues). The Local Government Appeals Tribunal dealt with building, subdivision and development matters. The Supreme Court of New South Wales undertook civil (equitable) enforcement and judicial review of both government and tribunal decisions. The Local Court and the District Court of New South Wales undertook criminal enforcement. Parliament ensured rationalization by vesting the Land and Environment Court with jurisdiction to deal with all of the matters formerly dealt with by these courts and tribunals.

In relation to specialization, the Court was given a wide jurisdiction in relation to environmental, planning and land matters. The jurisdiction was made exclusive; no other court or tribunal could exercise the jurisdiction given to the Land and

22. See Brian J. Preston & Jeff Smith, *Legislation Needed for an Effective Court*, in PROMISE, PERCEPTION, PROBLEMS & REMEDIES: THE LAND & ENVIRONMENT COURT & ENVIRONMENTAL LAW 1979-1999 at 103, 104 (Nature Conservation Council of NSW, 1999).

23. James McClelland, first Chief Judge of the Land & Environment Court, Address to the Hobart Engineering Conference (Jan. 24, 1982).

Environment Court.²⁴ Facilities were made for transfer of proceedings wrongly commenced in other courts to the Land and Environment Court.²⁵ Specialization was also to be promoted by appointment of appropriate personnel. The judges were to be judges of a superior court of record or lawyers of at least seven years' standing,²⁶ preferably with knowledge and expertise in matters within the jurisdiction of the Court or otherwise who would develop such knowledge and expertise. Additionally, there were to be technical and conciliation assessors (later termed Commissioners), being persons with special knowledge and expertise in areas such as local government administration, town planning, environmental science, land valuation, architecture, engineering, surveying, building construction, natural resources management, urban design, heritage, and land rights for Aborigines or disputes involving Aborigines.²⁷

Specialization was not seen to be an end, but rather a means to an end. It was envisaged that a specialist court could more ably deliver consistency in decision-making, decrease delays (through its understanding of the characteristics of environmental disputes) and facilitate the development of environmental laws, policies and principles. These aims have been realized in practice, as explained below.

D. Jurisdiction of the Court

As noted, the Court's jurisdiction falls into the following categories: administrative or merits review of governmental decisions; civil jurisdiction; civil enforcement; judicial review of governmental action; criminal enforcement (prosecutions); appeals against criminal convictions and sentences of the Local Court; and appeals against decisions of Commissioners of the Court.

Merits review is undertaken in three classes of the Court's jurisdiction: Class 1 involving environmental, planning and

24. *Land and Environment Court Act 1979* (NSW) ss 16, 71 (Austl.).

25. *Id.* s 72; *Civil Procedure Act 2005* (NSW) s 149 (Austl.).

26. *Land and Environment Court Act 1979* (NSW) s 8(2) (Austl.).

27. *Id.* s 12(2).

protection appeals;²⁸ Class 2 involving local government and miscellaneous appeals;²⁹ and Class 3 involving land tenure, valuation, rating and compensation matters, as well as Aboriginal land claims.³⁰

Merits review involves the re-exercise by the Court of the administrative power previously exercised by the original decision maker. The Court has the same functions and discretions as the original decision maker.³¹ The appeal is by way of rehearing and fresh evidence or evidence in addition to, or in substitution for, the evidence given on the making of the original decision may be given on the appeal.³² In determining the appeal, the Court is obliged to have regard to, amongst other matters, the circumstances of the case and the public interest.³³ The decision is deemed to be the final decision of the original decision maker and is to be given effect accordingly.³⁴

Merits review has numerous benefits including: providing a forum for full and open consideration of issues of importance; increasing accountability of decision makers; clarifying meaning of legislation; ensuring adherence to legislative principles and objects; focusing attention on the accuracy and quality of policy documents, guidelines and planning instruments; and highlighting problems that should be addressed by law reform.

Merits review in the Court is conducted with little formality and technicality.³⁵ The Court uses informal dispute resolution processes such as conciliation conferences and on-site hearings.³⁶ The Court can inform itself and use its specialist expertise in determining the appeal.³⁷

The Court has original civil jurisdiction to hear and dispose of tree and mining disputes. In 2006, common law actions in

28. *Id.* s 17.

29. *Id.* s 18.

30. *Id.* s 19.

31. *Id.* s 39(2).

32. *Land and Environment Court Act 1979* (NSW) s 39(3) (Austl.).

33. *Id.* s 39(4).

34. *Id.* s 39(5).

35. *Id.* s 38(1).

36. *Id.* ss 34, 34B.

37. *Id.* s 38(2).

nuisance in relation to urban trees were replaced by statutory applications under the *Trees (Disputes Between Neighbours) Act*³⁸ for orders in relation to trees causing damage to property or likely injury to persons, compensation for damage to property, and hedges severely obstructing sunlight to or views from dwellings.³⁹ In 2009, the Court acquired the jurisdiction formerly exercised by the Mining Warden's Court to hear and dispose of civil proceedings under the *Mining Act*⁴⁰ and *Petroleum (Onshore) Act*.⁴¹ The Court can enforce environmental laws, both civilly and criminally. Proceedings in Class 4 of the Court's jurisdiction can be of two types: civil enforcement, usually by government authorities but occasionally also by citizens, of planning or environmental laws to remedy or restrain breaches of those laws, and judicial review of administrative decisions and action under planning or environmental laws.⁴² Proceedings in Class 5 involve summary criminal enforcement proceedings, usually by government authorities prosecuting for offenses under planning or environmental laws.⁴³ Planning or environmental laws include legislation such as the *Environmental Planning and Assessment Act 1979*, *Protection of the Environment Operations Act 1997*, *Contaminated Land Management Act 1997*, *Environmentally Hazardous Chemicals Act 1985*, *Waste Avoidance and Resource Recovery Act 2001*, *Heritage Act 1977*, *Threatened Species Conservation Act 1995*, *National Parks and Wildlife Act 1974*, *Native Vegetation Act 2003* and *Wilderness Act 1987*, as well as mining legislation.⁴⁴

A key feature of the Court and the legislation it administers is the ability of the public to participate and have access to justice. Many of the planning or environmental laws contain open standing provisions, which enable any person to bring

38. *Trees (Disputes Between Neighbours) Act 2006* (NSW) (Austl.).

39. *See id.*

40. *Mining Act 1992* (NSW) (Austl.).

41. *Petroleum (Onshore) Act 1991* (NSW) (Austl.).

42. *Land and Environment Court Act 1979* (NSW) ss 20(1), (2).

43. *Id.* s 21.

44. *Id.* s 20(3).

proceedings to remedy or restrain breaches of the laws.⁴⁵ Public interest litigation has been a feature throughout the Court's history. The Court's decisions have been instrumental in the development of public interest litigation, both procedurally and substantively.⁴⁶ Non-governmental organizations have been key players in public interest litigation.

The Court's role in criminal enforcement has also been important. The Court's decisions have developed jurisprudence in relation to environmental crime.⁴⁷ This is particularly so in relation to sentencing. Environmental crimes have their own unique characteristics, which demand special consideration. As a specialist environment court, the Land and Environment Court is better able to achieve principled sentencing for environmental offenses. The Court, through its sentencing decisions, strives to achieve consistency and transparency in sentencing for environmental offenses.⁴⁸ It has been instrumental in establishing the world's first sentencing database for environmental offenses.⁴⁹

45. See, e.g., *Environmental Planning and Assessment Act 1979* (NSW) s 123 (Austl.).

46. See Brian J. Preston, *Public Enforcement of Environmental Laws in Australia*, 6 J. ENVTL. L. & LITIG. 39, 58, 60-61, 67, 76 (1991); Brian J. Preston, *Judicial Review in Australian Environmental Cases*, 1 ASIA PAC. L. REV. 39, 39, 42-43 (1992) (also available at 10 AUSTL. B. REV. 147 (1993)). See also Paul L. Stein, *A Specialist Environmental Court: An Australian Experience*, in PUBLIC INTEREST PERSPECTIVES IN ENVIRONMENTAL LAW 255 (David Robinson & John Dunkley eds., 1995); Paul L. Stein, *The Role of the New South Wales Land and Environment Court in the Emergence of Public Interest Law*, 13 ENVTL. & PLAN. L. J. 179 (1996); Justice Paul L. Stein, *New Directions in the Prevention and Resolution of Environmental Disputes – Specialist Environmental Courts*, Speech presented to The South-East Asian Regional Symposium on the Judiciary and The Law of Sustainable Development (March 6, 1999); Brian J. Preston, *The Role of Public Interest Environmental Litigation*, 23 ENVTL. & PLAN. L.J. 337 (2006).

47. See Brian J. Preston, *Environmental Crime*, in ENVIRONMENTAL RESPONSIBILITIES LAW NEW SOUTH WALES 3-501 to 3-589, at 3.920 (2007).

48. See Brian J. Preston, *Sentencing for Environmental Crime*, 18 JUD. OFFICERS BULL. 41 (2006); Brian J. Preston, *Principled Sentencing for Environmental Offences*, 31 CRIM. L. J. 91,142 (2007).

49. See BRIAN J. PRESTON & HUGH DONNELLY, JUDICIAL COMMISSION OF NEW SOUTH WALES, *ACHIEVING CONSISTENCY AND TRANSPARENCY IN SENTENCING FOR ENVIRONMENTAL OFFENCES* (2008), available at <http://www.judcom.nsw.gov.au/publications/research-monographs-1/research-monograph-32/monograph32.pdf>; see also Brian J. Preston & Hugh Donnelly, *Environmental Crime Sentencing*

In its appellate function, the Court determines appeals against conviction or sentence by the local court for environmental offenses. The Court's decisions have improved the quality and consistency of sentencing by the local court.

Appeals against decisions of Commissioners of the Court in Classes 1–3 and 8 on questions of law lie to the Judges of the Court.⁵⁰ This appellate function was transferred from the Court of Appeal of NSW.

The Court can also exercise the jurisdiction of the Supreme Court of New South Wales in proceedings transferred from that court. Since 2009, either the Supreme Court or the Land and Environment Court may transfer civil proceedings to the other court where it is more appropriate for the proceedings to be heard in the other court. The court to which civil proceedings are transferred has, and may exercise, the entire jurisdiction of the transferring court in relation to the transferred proceedings.⁵¹ The Supreme Court has transferred a number of common law proceedings, including actions in tort for environmental damage and judicial review of administrative decisions concerning the environment, under statutes not otherwise within the Court's jurisdiction.

E. Caseload of the Court

As a consequence of its wide jurisdiction, the Court has a sizeable caseload. In 2010, the Court's finalized caseload was 1,234 cases. This was distributed amongst the classes of the Court's jurisdiction as follows: 639 (Class 1); 128 (Class 2); 238 (Class 3); 158 (Class 4); 55 (Class 5); 11 (Classes 6 and 7), and 5 (Class 8).⁵²

Database is a World First, 20 JUD. OFFICERS' BULL. 27 (2008); Brian J. Preston & Hugh Donnelly, *The Establishment of an Environmental Crime Sentencing Database in New South Wales*, 32 CRIM. L. J. 214 (2008); see generally Brian J. Preston, *A Judge's Perspective on Using Sentencing Databases*, 9 JUD. REV. 421 (2010).

50. *Land and Environment Court Act 1979* (NSW) s 56A (Austl.).

51. *Civil Procedure Act 2005* (NSW) ss 149A–149E (Austl.).

52. LAND AND ENVIRONMENT COURT OF NSW, ANNUAL REVIEW 26-27 (2010), available at http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/LEC_AnnRev_2010.pdf?file/LEC_AnnRev_2010.pdf.

F. Court personnel

Court personnel are comprised of the Judges, the Commissioners, the Registrars and the Registry staff. The Judges consist of the Chief Judge and five puisne Judges. The Judges are all lawyers, four of whom were previously barristers (three being Queens Counsel or Senior Counsel) and two were previously solicitors. They have the same rank, title, status and precedence as judges of the Supreme Court of New South Wales.⁵³ They have tenure of office until the statutory retirement age of 72.⁵⁴

Judges of the Land and Environment Court may act as Supreme Court judges,⁵⁵ and judges of the Supreme Court may act as judges of the Land and Environment Court.⁵⁶ The Chief Judge of the Land and Environment Court is an additional Judge of Appeal in the Court of Appeal⁵⁷ and may also act as a Judge of the Court of Criminal Appeal.⁵⁸

The Commissioners are comprised of a Senior Commissioner, eight other full-time Commissioners and sixteen acting, part-time Commissioners who are called upon on a periodic basis to exercise the functions of a Commissioner as the need arises. Commissioners of the Court must have qualifications and experience in areas including: administration of local government or town planning; town, country or environmental planning; environmental science, protection of the environment or environmental assessment; land valuation; architecture, engineering, surveying or building construction; management of natural resources or Crown Lands; urban design or heritage; land rights for Aborigines or disputes involving Aborigines; and law.⁵⁹ Full-time Commissioners are appointed for a term of seven years, and are eligible for reappointment for further terms.⁶⁰ Persons appointed as an acting Commissioner are appointed for a term of

53. *Land and Environment Court Act 1979* (NSW) s 9(2) (Austl.).

54. *Judicial Officers Act 1986* (NSW) s 44 (Austl.).

55. *Supreme Court Act 1970* (NSW) ss 37B(1), (2) (Austl.).

56. *Land and Environment Court Act 1979* (NSW) s 11A (Austl.).

57. *Supreme Court Act 1970* (NSW) s 37A (Austl.).

58. *Criminal Appeal Act 1912* (NSW) s 3(1A) (Austl.).

59. *Land and Environment Court Act 1979* (NSW) s 12(2) (Austl.).

60. *Id.* s 12(4), sch 1(1)(1).

up to twelve months and are eligible for reappointment for further terms.⁶¹

The Court Registrar has the overall administrative responsibility of the Court, as well as exercising judicial powers, such as conducting directions hearings. The Chief Judge directs the Registrar on the day-to-day running of the Court. There is currently a Registrar (who is a solicitor) and an Assistant Registrar (who is also legally trained). The Registrar is an accredited mediator.

The Court Registry consists of four sections: Client Services; Listings; Information and Research; and Commissioner Support. The Client Services section is the initial contact for Court users and provides services such as procedural assistance, filing and issuing of court process, maintaining of records and exhibits, as well as having responsibilities under the Public Finance and Audit Act.⁶² It also provides administrative assistance for the Court's electronic document lodgement and communication system, called "eCourt." The Listings section provides listing services, including preparation of the Court's daily and weekly program, and publishes the daily Court list on the internet. The Information and Research section provides statistical analysis and research to the Registrar and the Chief Judge. It also supports the administration of the Court's website and the case law judgment database. The Commissioner Support section provides word processing and administrative support in the preparation of Commissioners' judgments and orders.

An essential part of ensuring that the Court achieves its potential is to not only appoint persons with appropriate knowledge and expertise, but to maintain and enhance such knowledge and expertise by training. The Court encourages ongoing education and professional development. The Court has adopted and implements a continuing professional development policy, which mandates each Judge and Commissioner of the Court to spend five days (or 30 hours) each calendar year on professional development activities relating to their professional duties. To assist in meeting the standard, the Court and the

61. *Id.* s 13(1).

62. *Public Finance and Audit Act 1983* (NSW) (Austl.).

Judicial Commission of New South Wales holds an annual conference of two days (12 hours) and a twilight seminar series providing at least 12 hours (two days) of professional development activities a year.

In addition, specialist-training programs are held periodically. For example, in 2009, nine full-time Commissioners, a Judge, and the Acting Registrar undertook a five-day mediation training course and a sixth day of accreditation and assessment conducted by the Australian Commercial Disputes Centre so as to attain national accreditation as a mediator. The Court also encourages Judges and Commissioners to attend conferences to further their education and development.⁶³ The Chief Judge, as head of a jurisdiction, attends the annual conference of the Supreme Court of New South Wales. Registry staff are also required to undertake regular programs of training and development.

G. Exercise of jurisdiction by Court personnel

Judges constitute the Court⁶⁴ and may exercise all classes of jurisdiction.⁶⁵ However, usually they will exercise the jurisdiction of the Court in Classes 3–7 inclusive and in Classes 1, 2 and 8 when legal issues or large or controversial issues are involved. Commissioners exercise functions in Classes 1–3 and in Class 8 if the Commissioner is an Australian lawyer.⁶⁶ The Chief Judge delegates jurisdiction to the Commissioners to act as the adjudicator,⁶⁷ conciliator,⁶⁸ mediator⁶⁹ or neutral evaluator.⁷⁰ When selecting the Commissioner and the function to be exercised, the Chief Judge considers the knowledge, experience and qualifications of the Commissioners and the nature of the

63. The judicial education and professional development of Judges and Commissioners are summarized each year in the Court's Annual Review. *See, e.g.*, ANNUAL REVIEW 2010, *supra* note 52, at ch. 6.

64. *Land and Environment Court Act 1979* (NSW) s 7 (Austl.).

65. *Id.* ss 33(1)–(3).

66. *Id.* ss 33(1), (2A).

67. *Id.* s 30(1).

68. *Id.* s 34(2).

69. *Civil Procedure Act 2005* (NSW) ss 26(1), (2) (Austl.).

70. *Land and Environment Court Rules 2007* (NSW) pt 6 r 6.2 (Austl.).

matters involved.⁷¹ The Registrars are responsible for case management of matters in Classes 1 and 2 and also act as conciliator⁷² or mediator⁷³ in appropriate matters.

III. THE COURT AS A MULTI-DOOR COURTHOUSE

A. Concept of a multi-door courthouse

Increasingly, the Court is operating as a form of multi-door courthouse. The concept of multi-door courthouse is that of a dispute resolution center offering intake services together with an array of dispute resolution processes under one roof. The idea is to match the appropriate dispute resolution process to the particular dispute.⁷⁴

B. Dispute resolution processes available

The Land and Environment Court offers a variety of dispute resolution processes, both in-house and externally. The in-house dispute resolution processes offered are: (a) adjudication in all Classes of jurisdiction (by Judges or Commissioners); (b) conciliation in Classes 1–3 (by Commissioners or Registrars);⁷⁵ (c) mediation in Classes 1–4 and 8 (by trained mediators, being the Registrar, full-time Commissioners and some Acting Commissioners);⁷⁶ and (d) neutral evaluation in Classes 1–3 (by Commissioners).⁷⁷ There are also informal mechanisms such as case management, which may result in negotiated settlement.⁷⁸

The Court also facilitates external dispute resolution processes of: (a) mediation by accredited mediators (in

71. *Land and Environment Court Act 1979* (NSW) s 30(2) (Austl.).

72. *Id.* s 34(14).

73. *Civil Procedure Act 2005* (NSW) s 26 (Austl.).

74. See Brian J. Preston, *The Land and Environment Court of New South Wales: Moving Towards a Multi-Door Courthouse*, 19 AUSTRALASIAN DISP. RESOL. J. 72, 144 (2008); see also Brian J. Preston, *The Use of Alternative Dispute Resolution in Administrative Disputes*, 22 AUSTRALASIAN DISP. RESOL. J. 144, 151-153 (2011) [hereinafter Preston, *Alternative Dispute Resolution*].

75. *Land and Environment Court Act 1979* (NSW) s 34 (Austl.).

76. *Civil Procedure Act 2005* (NSW) s 26 (Austl.).

77. *Land and Environment Court Rules 2007* (NSW) pt 6 r 6.2 (Austl.).

78. Preston, *Alternative Dispute Resolution*, *supra* note 74, at 151-53.

proceedings in Classes 1–4 and 8);⁷⁹ (b) neutral evaluation by neutral evaluators (such as a retired judge);⁸⁰ and (c) referral of the whole or part of a matter in Classes 1–4 and 8 to an external referee with special knowledge or expertise for enquiry and report to the Court.⁸¹

The alternative dispute resolution processes of conciliation, mediation and neutral evaluation offered by the Court warrant some elaboration. Conciliation is a process in which the parties to a dispute, with the assistance of an impartial conciliator, identify the issues in dispute, develop options, consider alternatives and endeavor to reach agreement. The conciliator may have an advisory role on the content of the dispute or the outcome of its resolution, but not a determinative role. The conciliator may advise on or determine the process of conciliation whereby resolution is attempted, and may make suggestions for terms of settlement, give expert advice on likely settlement terms, and may actively encourage the parties to reach agreement.⁸²

Conciliation in the Court is undertaken pursuant to section 34 of the Land and Environment Court Act.⁸³ This provides for a combined or hybrid dispute resolution process involving first, conciliation and then, if the parties agree, adjudication.⁸⁴

The conciliation involves a Commissioner, with technical expertise on issues relevant to the case, acting as a conciliator in a conference between the parties. The conciliator facilitates negotiation between the parties with a view to their achieving agreement as to the resolution of the dispute. If the parties are able to reach agreement, the conciliator, being a Commissioner of the Court, is able to dispose of the proceedings in accordance with

79. *Civil Procedure Act 2005* (NSW) s 26 (Austl.).

80. *Land and Environment Court Rules 2007* (NSW) pt 6 r 6.2 (Austl.).

81. *Uniform Civil Procedure Rules 2005* (NSW) pt 20 r 20.14 (Austl.).

82. NAT'L ALT. DISPUTE RESOLUTION ADVISORY COUNCIL, DISPUTE RESOLUTION TERMS at 5 (2003), available at http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_DisputeResolutionTerms.

83. *Land and Environment Court Act 1979* (NSW) s 34 (Austl.).

84. See Brian J. Preston, *Conciliation in the Land and Environment Court of New South Wales: History, Nature and Benefits*, 13 LOC. GOV'T L.J. 110, 123-26 (2007).

the parties' agreement.⁸⁵ Alternatively, even if the parties are not able to decide the substantive outcome of the dispute, they can nevertheless agree to the Commissioner adjudicating and disposing of the proceedings.⁸⁶

If the parties are not able to agree either about the substantive outcome or that the Commissioner should dispose of the proceedings, the conciliation conference is terminated and the proceedings are referred back to the Court for the purpose of being fixed for a hearing before another Commissioner. In such an event, the conciliation Commissioner makes a written report to the Court setting out that no agreement has been reached and that the conciliation conference has been terminated as well as stating what, in the Commissioner's opinion, are the issues in dispute between the parties to the proceedings.⁸⁷ This is still a useful outcome, as it scopes the issues and often will result in the proceedings being able to be heard and determined expeditiously, in less time and with less cost.

In early 2011, a fast-track, conciliation-arbitration process commenced for appeals concerning development applications, or modifications to development consents, for development for the purposes of detached single dwelling houses or dual occupancies (including subdivisions), or alterations or additions to such dwellings or dual occupancies.⁸⁸ This process makes it mandatory for appeals involving these types of residential development to be referred to conciliation, and if an agreement is not reached by the parties, immediately to a hearing before the same Commissioner who conducted the conciliation.⁸⁹

Mediation is a process in which the parties to a dispute, with the assistance of an impartial mediator, identify the disputed issues, develop options, consider alternatives and endeavor to reach an agreement. The mediator has "no advisory or determinative role in regard to the content of the dispute or the

85. *Land and Environment Court Act 1979* (NSW) s 34(3) (Austl.).

86. *Id.* s 34(4)(b).

87. *Id.* s 34(4)(a).

88. *Planning Appeals Legislation Amendment Act 2010* (NSW) (Austl.) (introducing Section 34AA of the *Land and Environment Court Act 1979* (NSW) (Austl.)).

89. *Land and Environment Court Act 1979* (NSW) s 34AA(2) (Austl.).

outcome of its resolution, but may advise on or determine the process of mediation whereby resolution is attempted.”⁹⁰

The Court may, at the request of the parties or of its own volition, refer proceedings in Classes 1, 2, 3, 4 and 8 to mediation.⁹¹ The Court provides a mediation service at no cost to the parties by referral to Court personnel who are trained in mediation. The Court will also refer proceedings for mediation to an external mediator not associated with the Court and agreed to by the parties.

Neutral evaluation is a process of evaluation of a dispute in which an impartial evaluator seeks to identify and reduce the issues of fact and law in dispute. The evaluator’s role includes assessing the relative strengths and weaknesses of each party’s case and offering an opinion as to the likely outcome of the proceedings, including any likely findings of liability or the award of damages.⁹²

The Court may refer proceedings in Classes 1, 2, 3, 4, and 8 to neutral evaluation with or without the consent of the parties.⁹³ The Court has referred matters to neutral evaluation by a Commissioner or an external person agreed to by the parties.

C. Intake screening, diagnosis and referral

Intake screening, diagnosis, and referral to the appropriate dispute resolution process occurs in a staged process: at the Registry counter; at the first return before the Court of any application commencing proceedings in the Court; and at any case management or dispute resolution orientation session that might be directed by the Court. Collectively, these occasions, and the persons who preside, constitute the intake screening, diagnosis and referral unit of the Court.

The screening, diagnosis and referral process in the Court is assisted by certain presumptions and protocols. The Court’s Practice Notes create a presumption in favor of referring matters in Classes 1–3 to conciliation, unless the parties demonstrate a

90. NAT’L ALT. DISPUTE RESOLUTION ADVISORY COUNCIL, *supra* note 82, at 9.

91. *Civil Procedure Act 2005* (NSW) s 26(1) (Austl.).

92. *Land and Environment Court Rules 2007* (NSW) pt 6 r 6.2(1) (Austl.).

93. *Id.* pt 6 r 6.2(2).

reason to the contrary. The Court's Practice Note Class 3 Valuation Objections contains a pre-action protocol. The parties are required to engage in mediation before commencing proceedings. Compliance is verified at the first directions hearing before the Court. The Court's practice notes for all Class 1–3 matters to contain post-action protocols. Parties are required to consider and report to the Court at the first subsequent directions hearing on the appropriateness of using the alternative dispute resolution processes of conciliation and mediation.

Recent amendments to the Civil Procedure Act⁹⁴ also require parties to civil proceedings (which include proceedings in Classes 1–4 and 8) to comply with pre-litigation requirements prior to commencing civil proceedings, including taking reasonable steps to resolve the dispute by agreement or clarifying and narrowing the issues in dispute. Compliance is verified by the filing of dispute resolution statements by the parties.⁹⁵

The Court screens, diagnoses, and refers matters to the appropriate dispute resolution process, both in consultation with the parties and also by its own motion. For matters in Classes 1 and 2 involving environmental, planning and local government appeals, and for Class 2 tree disputes, the Registrar at the directions hearings performs this function. In Class 8 mining disputes, a Mining Commissioner performs this task. In Classes 3–7, which are managed by a List Judge, the List Judge at the directions hearing performs the task. There is a specialist Compensation Claims and Valuation Appeals List managed by a specially assigned List Judge in order to case manage these types of proceedings in Class 3. Parties can select what they consider to be the appropriate dispute resolution process and may, subsequently, change their selection. This will involve referral

94. *Civil Procedure Act 2005* (NSW) (Austl.).

95. *Courts and Crimes Legislation Further Amendment Bill 2010* (NSW) (Austl.) (introducing Part 2A of the *Civil Procedure Act 2005* (NSW) (Austl.)). The provisions are not yet in force; their commencement is being deferred by Schedule 1 of the *Courts and Other Legislation Further Amendment Act 2011* (NSW) (Austl.) until 18 months after the date of assent for that Act (September 13, 2011) or such earlier date as the Governor may appoint by proclamation.

back to the Court for re-referral to a different dispute resolution process.⁹⁶

IV. JUST, QUICK, AND CHEAP RESOLUTION OF PROCEEDINGS

A. Case management to facilitate just, quick and cheap resolution

The Court is under a duty to give effect to the overriding purpose of facilitating the “just, quick and cheap resolution of the real issues” in the proceedings.⁹⁷ The attainment of the overriding purpose necessitates active case management.⁹⁸

In order to further the overriding purpose, proceedings are to be managed by the Court having regard to the following objects: “(a) the just determination of the proceedings, (b) the efficient disposal of the business of the court, (c) the efficient use of available judicial and administrative resources, (d) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.”⁹⁹

There is a degree of interrelationship between the goals of the “just,” “quick,” and “cheap” resolution of issues in proceedings.

B. Just resolution

To act in accordance with the dictates of justice includes dealing with cases in a manner that is expeditious and timely, proportionate to their importance and complexity, and cost efficient to both private parties and public resources.¹⁰⁰

96. Brian J. Preston, *The Land and Environment Court of New South Wales: Moving Towards a Multi-Door Courthouse* (pt 2), 19 AUSTRALASIAN DISP. RESOL. J. 144 (2008).

97. *Civil Procedure Act 2005* (NSW) ss 56(1), (2) (Austl.).

98. *Id.* s 57.

99. *Id.* s 57(1).

100. See, e.g., *AON Risk Serv. Austl. Ltd. V. Australian Nat'l Univ.* (2009), 239 CLR 175, 213 (Austl.) (discussing speed and efficiency as essential to the just resolution of the proceedings).

In determining what are the dictates of justice in a particular case, the Court:

(a) must have regard to the provisions of sections 56 [the overriding purpose is to facilitate the just, quick and cheap resolution of the real issues in the proceedings] and 57 [the object of case management is to further the overriding purpose]; and

(b) may have regard to the following matters to the extent to which it considers them relevant:

(i) the degree of difficulty or complexity to which the issues in the proceedings give rise,

(ii) the degree of expedition with which the respective parties have approached the proceedings, including the degree to which they have been timely in their interlocutory activities,

(iii) the degree to which any lack of expedition in approaching the proceedings has arisen from circumstances beyond the control of the respective parties,

(iv) the degree to which the respective parties have fulfilled their duties under section 56(3) [being to assist the court to further the overriding purpose in s 56 to facilitate the just, quick and cheap resolution of the real issues of the proceedings],

(v) the use that any party has made, or could have made, of any opportunity that has been available to the party in the course of the proceedings, whether under rules of court, the practice of the court or any direction of a procedural nature given in the proceedings,

(vi) the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction,

(vii) such other matters that the court considers relevant in the circumstances of the case.¹⁰¹

These mandatory and discretionary considerations underscore the interrelationship between the concept of justice and those of timeliness and efficiency.

101. *Civil Procedure Act 2005* (NSW) s 58(2) (Austl.).

C. Quick resolution

The goal of ensuring the “quick” resolution of the real issues in proceedings involves eliminating delay. “The delay of justice is a denial of justice” pronounced Lord Denning MR.¹⁰² Lord Denning continued: “All through the years men have protested at the law’s delay and counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time [Hamlet Act III, sc. 1]. Dickens tells how it exhausts finances, patience, courage, hope [Bleak House, ch. 1].”¹⁰³

Delay is interrelated with cost: the longer the period between lodgment and finalization of proceedings, the greater the cost. This is a result of many factors, but the increased number of attendances and adjournments are critical causes. As the Chief Justice of New South Wales has noted, litigation is a field in which Parkinson’s law operates: “work expands to fill the time set aside for it.”¹⁰⁴ Case management must attempt to minimize the number of attendances in court and restrict adjournments.¹⁰⁵

The increased cost is both to the parties and to public resources in the administration of the judicial system. Court resources, both in terms of time and facilities, are scarce and shrinking. Allocation of court resources to one case precludes allocation to another case. The consequence is that other cases are delayed. The Court has an obligation to monitor and ensure that public resources are applied in the best and most efficient means possible.¹⁰⁶

102. *Allen v. Sir Alfred McAlpine & Sons Ltd. and Another*, [1968] 2 Q.B. 229, 245 (U.K.).

103. *Id.* at 245.

104. James Spigelman, Chief Justice, New South Wales, Just, Quick and Cheap – A Standard for Civil Justice, Address to the Opening of Law Term, Address at the Parliament House of Sydney (Jan. 31, 2000), *available at* http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwPrint1/SCO_speech_spigelman_310100.

105. James Spigelman, Chief Justice, New South Wales, Case Management in New South Wales, Address to the Malaysian Annual Judges Conference in Malaysia (Aug. 22, 2006), *available at* http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwPrint1/SCO_spigelman220806.

106. *Christmas Island Resort Pty. Ltd. v. Geraldton Bldg. Co. Pty. Ltd. (No. 5)* (1997), 140 FLR 452, 462 (Austl.).

D. Cheap resolution

The goal of “cheap” resolution of the real issues in the proceedings involves the concept of proportionality of costs. Cases need to be managed and resolved in such a way that the “cost to the parties is proportionate to the importance and complexity of the subject matter in dispute.”¹⁰⁷ The criterion of proportionality includes the amount in issue in the proceedings and the relative importance of the subject matter of the proceedings (to be determined having regard to factors such as the status of the parties and the nature of the proceedings).

E. Means to achieve a just, quick, and cheap resolution

In order to serve the overriding purpose of the Civil Procedure Act 2005, the Court is given a comprehensive range of powers. These powers are in the Civil Procedure Act and Uniform Civil Procedure Rules, the Land and Environment Court Act, and Land and Environment Court Rules.¹⁰⁸ The Court’s practice notes guide the exercise of these powers.

To achieve the overriding purpose, the Court has the power to: (a) direct parties to take specified steps and to comply with timetables and otherwise to conduct proceedings as directed;¹⁰⁹ (b) regulate the conduct of the hearing including limiting the time that may be taken in cross-examination, limiting the number of witnesses, limiting the number of documents that may be tendered, and limiting the time that may be taken by a party in presenting its case or in making submissions;¹¹⁰ (c) take into account when deciding whether to make a direction as to the conduct of the hearing, not only the requirements of procedural fairness but also a range of relevant matters including, the subject matter, complexity or simplicity of the case, the efficient administration of court lists, the interests of parties to other

107. *Civil Procedure Act 2005* (NSW) s 60 (Austl.).

108. See generally, *Civil Procedure Act 2005* (NSW) (Austl.); *Uniform Civil Procedure Rules 2005* (NSW) (Austl.); *Land and Environment Court Act, 1979* (NSW) (Austl.); *Land and Environment Court Rules 2007* (NSW) (Austl.).

109. *Civil Procedure Act 2005* (NSW) ss 61(1),(2) (Austl.).

110. *Id.* s 62(3).

proceedings before the Court and the costs of the proceedings;¹¹¹ and (d) direct, at any time, a solicitor or barrister for a party to provide to his or her client a memorandum stating the estimated length of the hearing and estimated costs of legal representation including costs payable to the other party if the client is unsuccessful.¹¹²

The concern of achieving the overriding purpose of facilitating the just, quick, and cheap resolution of the real issues in the proceedings is reflected in the Court's Practice Notes. The Court uses differential case management in recognition not only of the different classes of jurisdiction, but also of the different nature of matters within a class. The Practice Notes group practice and procedure according to the types of proceedings. The Court has Practice Notes for Class 1 Development Appeals; Class 1 Residential Development Appeals; Classes 1, 2 and 3 Miscellaneous Appeals; Class 2 Tree Applications; Class 3 Compensation Claims; Class 3 Valuation Objections; and Class 4 Applications.

The Practice Notes and Information Sheets provide template litigation plans. A litigation plan sets procedural steps with deadlines for the case to move through pre-trial procedures to summary disposition or trial. Parties and the Court may select or adapt the template to suit the particular circumstances of the case. This includes the appropriate litigation steps, types of evidence and type of hearing. The emphasis is on ensuring proportionality to the importance of the case and the costs of litigation.

F. Pre-hearing attendance options

The Court offers three types of pre-hearing attendances: (1) In-court directions hearing where representatives of the parties attend court before the Judge, Commissioner, or Registrar; (2) Telephone directions hearing where representatives of the parties talk with the Judge, Commissioner, or Registrar in a telephone conference call; and (3) eCourt directions hearing where representatives of the parties communicate with the Registrar

111. *Id.* ss 62(4), (5).

112. *Id.* s 62(6).

and each other electronically using the Court's internet service, eCourt.

G. Hearing options

The Court offers a variety of options for the final hearing: (a) A court hearing is available for all matters in all Classes; (b) An on-site hearing is available for matters in Classes 1 and 2. An on-site hearing is the final determination of the matter conducted at the site and the subject of the appeal. Apart from the judgment, an on-site hearing is not recorded; (c) A partial on-site hearing is available for matters in Classes 1 to 3, usually commencing on-site by taking evidence of lay witnesses such as resident objectors on-site, and undertaking a view of the site and surroundings in the presence of the parties. The hearing resumes in Court as usual; (d) Video-conferencing is available in all matters for taking evidence of remote witnesses.

V. MEASURING COURT PERFORMANCE

In order to determine whether the various measures of practice and procedure adopted by the Court are effective in facilitating the just, quick and cheap resolution of the real issues in the proceedings, the Court needs to monitor and measure performance.

The Court has developed a suite of performance indicators for the administration of the Court. Many of these are instructive in determining whether the overriding purpose of facilitating the just, quick, and cheap resolution of the real issues in the proceedings is being achieved.

The objectives of court administration are equity, effectiveness, and efficiency. The performance of a court in achieving these objectives may be evaluated by reference to output and outcome indicators. Outputs are the actual services delivered. Outcomes are the impacts of these services on the status of an individual or group.

The objectives of equity and effectiveness involve ensuring access to justice. Access to justice can be evaluated by reference to various criteria, both quantitative and qualitative. These include: affordability of litigation in the court; accessibility,

including geographical accessibility, access for people with disabilities, access to help and information, access for legally unrepresented litigants, access to alternative dispute resolution and facilitating public participation; responsiveness to the needs of users; timeliness and delay measured by a backlog indicator; and compliance with time standards for finalisation of cases. The objective of effectiveness also involves the quality of services delivered. The objective of efficiency can be evaluated by output indicators including, an attendance indicator, a clearance indicator and the cost per finalization.

These performance indicators assist in evaluating the Court's performance in facilitating the just, quick, and cheap resolution of proceedings. Of relevance to the goal of facilitating the "quick" resolution of the real issues in proceedings are the backlog indicator, clearance rate indicator, and attendance indicator. Of relevance to the goal of facilitating the "cheap" resolution of the real issues in proceedings are these three indicators (because delay increases costs) as well as the cost per finalization. Each of these indicators are output indicators.

The goal of facilitating the "just" resolution of the real issues and proceedings is more difficult to measure. Lord Woolf identified a number of principles which a civil justice system should meet in order to ensure access to justice. The system should aspire to:

- (a) be *just* in the results it delivers;
- (b) be *fair* in the way it treats litigants;
- (c) offer appropriate procedures at a reasonable *cost*;
- (d) deal with cases with reasonable *speed*;
- (e) be *understandable* to those who use it;
- (f) be *responsive* to the needs of those who use it;
- (g) provide as much *certainty* as the nature of particular cases allows; and
- (h) be *effective*: adequately resourced and organised.¹¹³

Some of these principles are outcomes of the justice system, notably ensuring a just result by fair means. They contribute to

113. HARRY WOOLF, ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES 2 (1996).

the achievement of the objective of equity. Other principles are outputs of the justice system including the cost and speed of litigation, and the resources and organization of the court. These contribute to the achievement of the objectives of effectiveness and efficiency.

Measuring the performance of the Court in delivering access to justice is more difficult for outcomes than for outputs of the system. Ensuring the just resolution of proceedings involves examining the quality of the outcome of a case, specifically whether the result is a fair outcome and reached by fair means.¹¹⁴ However, there are no accepted outcome indicators for measuring the quality of court administration.¹¹⁵ Indeed, there are serious reservations about the appropriateness of measuring the quality of judicial decisions.¹¹⁶ Measuring the number of appeals from a court's decision and their success is not an appropriate or useful quality indicator.¹¹⁷ The Chief Justice of Canada has suggested that quality is more likely to result if the Court, and its judges and officers, retain certain virtues. They must be knowledgeable, independent, impartial, connected to society, more diverse – reflecting our society, more efficient, better at communicating with the public, better educated and possess, conscience, courage and absolute integrity.¹¹⁸ The Land and Environment Court strives to uphold these virtues.

114. Murray Gleeson, *Judicial Accountability*, 2 JUD. REV. 117, 120 (1995); James J. Spigelman, *Seen to be Done: The Principle of Open Justice*, 74 AUSTL. L.J. 290, 292 (2000).

115. AUSTRALIAN GOVERNMENT PRODUCTIVITY COMMISSION, REPORT ON GOVERNMENT SERVICES, 7.21, 7.24 (2008) available at http://www.pc.gov.au/_data/assets/pdf_file/0007/75076/rogs-2008-volume1.pdf.

116. See James J. Spigelman, *The 'New Public Management' and the Courts*, 75 AUSTL. L.J. 748, 753 (2001); James J. Spigelman, Chief Justice, NSW, *Measuring Court Performance*, Address to the Annual Conference of the Australian Institute of Judicial Administration (Sept. 16, 2006), available at http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwPrint1/SCO_spigelman160906.

117. *Id.*

118. See Beverley McLachlin, Chief Justice of Canada, *The 21st Century Courts: Old Challenges and New*, Speech given at the Fourteenth Austl. Institute of Judicial Administration Incorporated Oration in Judicial Administration (Apr. 28, 2006), at 6-14, available at <http://www.aija.org.au/Orations/Oration06.pdf>.

VI. BENEFITS OF THE LAND AND ENVIRONMENT COURT: THE “DESIRABLE DOZEN”

The Land and Environment Court is a successful model of a specialist environment court. It may be helpful to summarize some of the benefits that have flowed from the establishment and operation of the Court over the last quarter of a century. At least a dozen benefits can be identified:

1. Rationalization;
2. Specialization;
3. Multi-Door Courthouse;
4. Superior court of record;
5. Independence from government;
6. Responsiveness to environmental problems;
7. Facilitates access to justice;
8. Development of environmental jurisprudence;
9. Better court administration;
10. Unifying ethos and mission;
11. Decision-making is value- adding; and
12. Flexible and innovative.

I will deal with each of these “desirable dozen” in turn.

1. Rationalization

Rationalization and centralization of jurisdiction has resulted in the Court having a comprehensive, integrated, and coherent environmental jurisdiction. This increases the number of cases in the court and ensures there is a “critical mass” of cases in the court, which results in economies of scale not able to be achieved by dissipation of environmental matters throughout different courts and tribunals. There are also economic efficiencies, including lower transaction costs, for users and public resources in having a “one-stop shop.” Paul Stein, a former judge of the Court, posited that having an integrated, wide-ranging jurisdiction (a one-stop shop):

decreases multiple proceedings arising out of the same environmental dispute; reduces costs and delays and may lead to cheaper project development and prices for consumers; greater convenience, efficiency and effectiveness in development control

decisions; a greater degree of certainty in development projects; a single combined jurisdiction is administratively cheaper than multiple separate tribunals; litigation will often be reduced with consequent savings to the community.¹¹⁹

A one-stop shop also facilitates better quality and innovative decision-making in both substance and procedure by cross-fertilization between different classes of jurisdiction. The Court becomes a focus of environmental legal decision-making. It increases the awareness of users, government, environmental NGOs, civil society, legal and other professions and educational institutions of environmental law, policy and issues. Increased awareness, in turn, facilitates increased recourse to, and enforcement of, environmental law. This improves good governance, a critical element in achieving ecologically sustainable development.¹²⁰

2. Specialization

Environmental issues and the legal and policy responses demand special knowledge and expertise. Judges need to be educated about and attuned to environmental issues and the legal and policy responses—they need to be environmentally literate. There is a need for judicial education for judges to be appointed to a specialized court as well as continuing professional development of judges during their tenure on the court. The Court recognizes the importance of judicial education through its policy and program on continuing professional development. Having a critical mass of cases also enables judges to increase knowledge and expertise over time: practice makes perfect.

Decision-making quality, effectiveness, and efficiency can be enhanced by the availability of technical experts within the court. Technical experts can undertake the role of assessors or commissioners who can advise and assist judges, determine appropriate disputes themselves (such as merits review appeals)

119. Justice Paul L. Stein, *A Specialist Environmental Court: An Australian Experience*, in PUBLIC INTEREST PERSPECTIVES IN ENVIRONMENTAL LAW 263 (Robinson & Dunkley eds., 1995).

120. *Hub Action Grp., Inc. v. Minister for Planning & Orange City Council* (2008), 161 LGERA 136, 139 (Austl.).

and undertake ADR functions such as conciliation and mediation of environmental disputes. Bringing together in the one court judicial decision-makers (both judges and technical experts) with knowledge and expertise in environmental law creates a center of excellence, a think tank on environmental law. Bringing experts together creates a synergy and facilitates a free and beneficial exchange of ideas and information. The existence in the court of multidisciplinary decision-makers (both judges and technical experts) enables the assembling of panels of decision-makers with expertise relevant to the issues in the case so as to facilitate interdisciplinary decision-making.

A specialized environment court facilitates the development of specialized environmental lawyers. There is a symbiotic relationship between the courts and the legal profession. A specialized environmental court benefits from having lawyers with specialized knowledge of environmental law and issues. In turn, a specialized environmental court facilitates lawyers continuing to develop their environmental legal knowledge and environmental literacy.

A specialist environmental court can adopt a holistic approach to the resolution of environmental matters, both by reason of its comprehensive jurisdiction (a result of rationalization) and of interdisciplinary decision-making (a result of specialization and the availability of multidisciplinary decision-makers).

3. Multi-Door Courthouse

Rationalization, specialization, and the availability of a range of court personnel facilitate a range of ADR mechanisms. Rationalization means that the Court can deal with multiple facets of an environmental dispute and is not unduly limited by the jurisdictional limits of a court. For example, remedies for breach of law could include not only civil remedies of a prohibitory or mandatory injunction but also administrative remedies of grant of approval to make the conduct lawful in the future. Specialization facilitates a better appreciation of the nature and characteristics of environmental disputes and selection of the appropriate dispute resolution mechanism for each dispute. Availability of technical experts (Commissioners)

in the Court enables their involvement in conciliation and neutral evaluation, as well as improving the quality, effectiveness, and efficiency of adjudication.

4. Superior court of record

Establishing an environmental court as a superior court of record enlarges the jurisdiction of the court to include those powers only a superior court of record possesses. The Land and Environment Court has the same powers as the Supreme Court of New South Wales in relation to judicial review, granting equitable remedies for civil enforcement, granting easements over land in certain circumstances, and appellate review of decisions of Commissioners and criminal decisions. A superior court of record enjoys a higher status than either an inferior court or tribunal. According that status is a public acknowledgment of the importance of environmental issues and a public pronouncement of the importance of the court and its decisions. A superior court is better able to attract and keep high caliber persons for judicial appointments.

5. Independence from government

Establishing an environmental court as a court, rather than as an organ of the executive branch of government, and as a superior court of record, rather than an inferior court or tribunal, enhances independence. Granting the judges tenure until the statutory retirement age also enhances judicial independence.¹²¹ Independence of the judiciary is a fundamental aspect of the rule of law.¹²²

6. Responsiveness to environmental problems

An environmental court is better able to address the pressing, pervasive, and pernicious environmental problems that confront society (such as global warming and loss of biodiversity).

121. Steven Rares, *What is a Quality Judiciary?*, 20 J. JUD. ADMIN. 133, 135 (2011).

122. JOSEPH RAZ, *THE AUTHORITY OF LAW* 216-17 (1979); TOM BINGHAM, *THE RULE OF LAW* 91-92 (2010).

New institutions and creative attitudes are required to address these problems. Specialization enables use of special knowledge and expertise in both the process and the substance of resolution of these problems. Rationalization enlarges the remedies available. An environmental court is better positioned to develop innovative remedies and holistic solutions to environmental problems.

7. Facilitates access to justice

Access to justice includes access to environmental justice.¹²³ A court can facilitate access to justice both by (1) its substantive decisions and (2) its practices and procedures.

i. Substantive decisions upholding access to justice

Substantive decisions can uphold fundamental constitutional, statutory and human rights of access to justice. The Court has upheld statutory rights of public access to information; rights to public participation in legislative and administrative decision-making, including requirements for public notification, exhibition and submission and requirements for adequate environmental impact assessment; and public rights to review and appeal legislative and administrative decisions and conduct.

ii. Practice and procedure facilitating access to justice

A court can adopt innovative practices and procedures to facilitate access to justice, including removing barriers to public interest litigation. The Court has facilitated public interest litigation by its decisions to: construe liberally standing requirements; not necessarily require an undertaking for damages as a pre-requisite for granting interlocutory injunctive

123. See United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, 10, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992); Convention on Access to Information, *Public Participation in Decision-Making and Access to Justice in Environmental Matters*, recitals, arts. 1, 3, 9, June 25, 1998, 2161 U.N.T.S. 447.

relief; not necessarily require an impecunious public interest litigant to lodge security for the costs of the proceedings; not summarily dismiss proceedings on the ground of laches; and not necessarily require an unsuccessful public interest litigant to pay the costs of the proceedings.¹²⁴ Additionally, parties may appear in the Court by legal representation, by agent authorized in writing, or in person.¹²⁵

The Court's Rules and Practice Notes require government agencies to discover relevant documents in merits review appeals¹²⁶ and in judicial review proceedings, and to give reasons in judicial review proceedings.¹²⁷

A court can ensure the just, quick and cheap resolution of proceedings, thereby ensuring that rights of review and appeal are not merely theoretically, but are actually available to all who are entitled to seek review or appeal. The Court has particularly adapted its practice and procedure for merits review appeals in Classes 1, 2 and 3 to this end. Merits review appeals in Classes 1, 2 and 3 are conducted with as little formality and technicality, and with as much expedition, as the requirements of relevant statutes and as the proper consideration of the matters before the Court permit.¹²⁸ Further, "the Court is not bound by the rules of evidence but may inform itself on any matter in such manner as

124. *Land and Environment Court Rules 2007* (NSW) pt 4 r 4.2 (Austl.); see generally works cited in *supra* note 46.

125. *Land and Environment Court Act 1979* (NSW) s 63 (Austl.).

126. See Land and Environment Court of N.S.W., Practice Note, Class 1 Development Appeals, ¶ 11 (May 14, 2007), available at http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_practicedirections; Land and Environment Court of N.S.W., Practice Note, Classes 1, 2 and 3 Miscellaneous Appeals, ¶ 6 (May 14, 2007), available at http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_practicedirections; Land and Environment Court of N.S.W., Practice Note, Class 3 Valuation Objections, ¶ 10 (May 14, 2007), available at http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_practicedirections.

127. *Land and Environment Court Rules 2007* (NSW) pt 4 r 4.3 (Austl.); Land and Environment Court of N.S.W., Practice Note, Class 4 Proceedings, ¶ 14 (May 14, 2007), available at [http://intranet.lawlink/lec/ll_lec.nsf/vwFiles/PN_Class_4_Proceedings_14_May_2007.doc/\\$file/PN_Class_4_Proceedings_14_May_2007.doc](http://intranet.lawlink/lec/ll_lec.nsf/vwFiles/PN_Class_4_Proceedings_14_May_2007.doc/$file/PN_Class_4_Proceedings_14_May_2007.doc).

128. *Land and Environment Court Act 1979* (NSW) s 38(1) (Austl.).

it thinks appropriate and as the proper consideration of the matters before the Court permits.”¹²⁹

iii. Addressing inequality of alms

A court can address inequality of alms between parties. Specialization and the availability of technical experts (Commissioners) in the Court redress, in part, the inequality of resources and access to expert assistance and evidence. The Court ensures: access for persons with disabilities; access to help and information (by information from the Court’s website, information sheets and registry staff); access for unrepresented litigants (special fact sheet as well as other sources of self-help above); and geographical accessibility (use of eCourt, telephone conferences, video-conferencing, country hearings, on-site hearings and taking evidence on site).

iv. Access to help and information

The Court facilitates access to help and provides information to parties about the Court and its organization, resources and services, the Court’s practices and procedures, its forms and fees, court lists and judgments, publications, speeches and media releases, and self-help information, amongst other information. Primarily, it does this by its website. However, the Court also has guides on the Court and other information available at the Registry counter. Registry staff assist parties and practitioners, answer questions and provide information.

The local courts throughout New South Wales also have information on the Land and Environment Court and documents may be filed in local courts, which are forwarded to the Land and Environment Court.

The Court has established specialized web pages for categories of disputes, including disputes under the Trees (Disputes Between Neighbours) Act 2006; mining disputes under the Mining Act 1992 and Petroleum (Onshore) Act 1991; disputes raising issues of biodiversity; disputes raising issues of heritage; and decisions establishing planning principles. These innovative

129. *Id.* s 38(2).

and informative webpages explain the specialized area of jurisdiction and provide links to: relevant primary and subordinate legislation; decisions of the Court, as well as other courts in Australia, relevant to the specialized area of jurisdiction, grouped under relevant categories of decisions; external governmental and non-governmental sites on the specialized area of jurisdiction; as well as other useful information. The Court is in the process of preparing a new webpage on valuation objections, another specialized area of jurisdiction of the Court. The webpages have been highly commended by court users, lawyers, government and non-government organizations, university and educational institutions, and the public.

The Court, in conjunction with the Judicial Commission of New South Wales, has been a world leader in developing a sentencing database for environmental crime. The sentencing database is part of the Judicial Information Research System (JIRS), which is maintained by the Judicial Commission of New South Wales. It is accessible to all judicial officers for free and to other persons by subscription. Sentencing statistics for environmental offenses display sentencing graphs and a range of objective and subjective features relevant to the environmental offenses. The user is able to access directly the remarks on sentencing behind each graph. The Court has publicized this innovative sentencing database¹³⁰ and reports it in its Annual Reviews.¹³¹

The Court identified that another effective means of publicizing its decisions would be to publish a court newsletter. Accordingly, the Court now produces and publishes a comprehensive quarterly newsletter summarizing recent legislation, judicial decisions of the Court, as well as decisions of other courts in areas of the Court's jurisdiction, and changes in practice, procedure, and policies of the Court. The Court is the first court in New South Wales, and perhaps elsewhere, to make available such information in such a format. The newsletters are publicly accessible on the Court's website on its homepage under

130. See generally works cited in *supra* note 49.

131. See, e.g., LAND & ENVIRONMENT COURT OF N.S.W., *supra* note 52, at 24.

Legal Resources.¹³² The newsletter is published electronically so that links are available to all legislation, decisions, and policies summarized in the newsletter.

The Court identified a need to be proactive in communicating decisions to the community and court users as they are made. To this end, the Court has established an e-mail notification system for specialized areas of the Court's jurisdiction, which currently includes tree and native vegetation as well as mining. E-mails are sent to court users, lawyers and members of civil society who have registered to receive notification of recent legislation, court policies, practice and procedure, and court decisions relevant to these specialized areas of the Court's jurisdiction. The Court is investigating extending this e-mail notification service to other specialized areas of the Court's jurisdiction.

The Court publishes speeches, papers and articles of Judges and Commissioners on the Court's website. The feedback the Court has received is that these speeches are extensively referenced both in Australia and overseas.

The Court additionally publishes an Annual Review. The Court has made concerted efforts to provide considerably more information on the Court and its personnel, processes, and performance than has been customary for other courts. The product is a valuable source of information that is referenced and used by lawyers, court users and the public. The Court's Annual Reviews are available on the Court website and are also distributed in hard copy and on CD to hundreds of organizations and persons interested in the Court and its work.

The Court has worked closely with a legal professional organization, NSW Young Lawyers, in the production of *A Practitioner's Guide to the Land and Environment Court of NSW*.¹³³ The guide improves access to justice by providing concise explanations in plain English of the Court and its practice and procedure. The guide is provided in hard copy by the registry

132. See, e.g., 3 LAND & ENV'T CT. NSW JUD. NEWSL. (2011).

133. NSW YOUNG LAWYERS, A PRACTITIONER'S GUIDE TO THE LAND AND ENVIRONMENT COURT OF NSW (3d ed. 2009), available at [www.infolink/lawlink/lec/ll_lec.nsf/vwFiles/Young_Lawyers_LEC_Court_Guide_24February2009.pdf/\\$file/Young_Lawyers_LEC_Court_Guide_24February2009.pdf](http://www.infolink/lawlink/lec/ll_lec.nsf/vwFiles/Young_Lawyers_LEC_Court_Guide_24February2009.pdf/$file/Young_Lawyers_LEC_Court_Guide_24February2009.pdf).

to self-represented litigants and practitioners unfamiliar with the jurisdiction. It is also accessible electronically on the Court's website under Publications. The provision of such help and information facilitates access to justice and allows the people who use the judicial system to understand it.

v. Providing geographical accessibility

Geographical accessibility concerns ensuring parties, and their representatives and witnesses, are able to access the Court in geographical terms. New South Wales is a large state.¹³⁴ The Land and Environment Court is located in Sydney, which is a considerable distance from much of the population. To overcome geographical accessibility problems, the Court has adopted a number of measures.

First, the Court regularly holds hearings in country locations throughout New South Wales. These are conducted in Local Courts proximate to the land of the subject of the appeal (for court hearings) or on-site (for on-site hearings).

Secondly, for attendances before hearings, the Court has established the facility of a telephone callover. This type of callover takes place in a court equipped with conference call equipment where the parties or their representatives can participate in the court attendance whilst remaining in their distant geographical location.

Thirdly, the Court has pioneered the use of eCourt callovers. This involves the parties or their representatives posting electronic requests to the Registrar using an internet accessible and secure system, eCourt, and the Registrar responding in the same way. This also mitigates the tyranny of distance.

Fourthly, conduct of the whole or part of a hearing on the site of the dispute also means that the Court comes to the litigants. An official on-site hearing involves conducting the whole hearing on-site. This type of hearing is required where there has been a direction that an appeal be conducted as an on-site hearing.¹³⁵

134. New South Wales has a land area of 800,642 square kilometers.

135. For appeals under ss 96, 96AA, 97, 121ZK or 149F of the *Environmental Planning and Assessment Act 1979* (NSW) (Austl.) or s 7 of the *Trees (Disputes Between Neighbours) Act 2006* (NSW) (Austl.).

The hearing is conducted as a conference presided over by a Commissioner on the site of the development.

However, even for other hearings that may be conducted as a court hearing, it is the Court's standard practice that the hearing commence at 9:30 a.m. on site. This enables not only a view of the site and surrounds but also the taking of evidence from residents and other persons on the site. This facilitates participation in the proceedings by witnesses and avoids the necessity for their attendance at the Court in Sydney.

8. Development of environmental jurisprudence

The Court has shown that an environmental court of the requisite status has more specialized knowledge, has an increased number of cases and hence more opportunity to – and is more likely to – develop environmental jurisprudence. The Court's decisions have developed aspects of substantive, procedural, restorative, therapeutic, and distributive justice:

Substantive justice: the Court has been a leader in developing jurisprudence in relation to principles of ecologically sustainable development (including the principle of integration, the precautionary principle, inter- and intragenerational equity, conservation of biological diversity, and ecological integrity and internalization of external environmental costs including the polluter pays principle),¹³⁶ environmental impact assessment,¹³⁷ public trust,¹³⁸ and sentencing for environmental crime;¹³⁹

136. See cases discussed in Preston, *The Role of the Judiciary in Promoting Sustainable Development*, *supra* note 4.

137. See *Prineas v. Forestry Comm'n of N.S.W.* (1983), 49 LGRA 402, 417 (Austl.); *Warren v. Elec. Comm'n of N.S.W.* (1990), 130 LGERA 565, 569-71 (Austl.); *Schaffer Corp. Ltd. v. Hawkesbury City Council* (1992), 77 LGRA 21, 30-31 (Austl.); *Bentley v. BGP Props. Pty Ltd.* (2006), 145 LGERA 234, 245-46 [67]-[71] (Austl.); *F & D Bonaccorso Pty Ltd. v. Canada Bay Council & Ors (No. 2)* (2007), 158 LGERA 250, 271-73 [55]-[60] (Austl.); Brian J. Preston, *Adequacy of Environmental Impact Statements in New South Wales*, 3 ENVTL. & PLAN. L.J. 194 (1986); Brian J. Preston, *The Environmental Impact Statement Threshold Test: When is an Activity Likely to Significantly Affect the Environment?*, 7 ENVTL. & PLAN. L.J. 147 (1990).

138. *Willoughby City Council v. Minister Administering the National Parks & Wildlife Act* (1992), 78 LGRA 19 (Austl.); see also Tim Bonyhady, *A Usable Past: The Public Trust in Australia*, 12 ENVTL. & PLAN. L.J. 329 (1995); Preston, *The*

Procedural justice: access to justice including removal of barriers to public interest litigation in relation to standing, interlocutory injunctions, security for costs, laches, and costs;¹⁴⁰

Distributive justice: inter- and intragenerational equity,¹⁴¹ polluter pays principle,¹⁴² and balancing public and private rights and responsibilities;¹⁴³

Restorative justice: victim-offender mediation¹⁴⁴ and polluter pays principle for environmental crime;¹⁴⁵ and

Therapeutic justice: adopting Court practice and procedure to improve welfare of litigants, including improving accessibility.

9. Better court administration

The Court model has facilitated better achievement of the objectives of court administration of equity, effectiveness and

Role of the Judiciary in Promoting Sustainable Development, *supra* note 4, at 203-06.

139. See generally Preston, *Sentencing for Environmental Crime*, *supra* note 48.

140. See *Caroona Coal Action Grp. Inc. v. Coal Mines Austl. Pty Ltd. (No 3)* (2010), 173 LGERA 280, 284-296, ¶¶ 4-61 (Austl.); *Hill Top Residents Action Grp. Inc. v. Minister for Planning (No 3)* (2010), 176 LGERA 20, 29-30, ¶¶ 37-43 (Austl.) (regarding costs in public interest litigation); see also articles discussed in *supra* note 46.

141. *Gray v. Minister for Planning* (2006), 152 LGERA 258, 293-94, ¶¶ 118-26 (Austl.); *Taralga Landscape Guardians Inc. v. Minister for Planning & RES Southern Cross Pty Ltd.* (2007), 161 LGERA 1, 12, ¶¶ 73-74 (Austl.); *Hub Action Grp. Inc. v. Minister for Planning & Orange City Council* (2008), 161 LGERA 136, 158, ¶ 72 (Austl.).

142. *Bentley v. BGP Properties Pty Ltd.* (2006), 145 LGERA 234, 257-58, ¶¶ 156-57 (Austl.); *Env't Prot. Auth. v. Waste Recycling & Processing Corp.* (2006), 148 LGERA 299, 341 ¶¶ 230-232 (Austl.); *Dir.-Gen., Dep't of Env't, Climate Change & Water v. Venn* (2011), NSWLEC 118, ¶¶ 328-30 (Austl.); *Jeffman Pty Ltd. v. Env't Prot. Auth.* (2011), NSWLEC 89, ¶¶ 81-82 (Austl.).

143. *Taralga Landscape Guardians Inc. v. Minister for Planning & RES Southern Cross Pty Ltd.* (2007), 161 LGERA 1 (Austl.).

144. *Garrett v. Williams* (2007), 151 LGERA 92 (Austl.); see also John M. McDonald, *Restorative Justice Process in Case Law*, 33 ALT. L.J. 40 (2008); Mark Hamilton, *Restorative Justice Intervention in an Environmental Law Context: Garrett v. Williams, Prosecutions under the Resource Management Act 1991 (NZ), and Beyond*, 25 ENVTL. & PLAN. L.J. 263 (2008); Brian J. Preston, *The Use of Restorative Justice for Environmental Crime*, 35 CRIM. L.J. 136 (2011).

145. See cases discussed in Brian J. Preston, *Sustainable Development Law in the Courts: The Polluter Pays Principle*, 26 ENVTL. & PLAN. L.J. 257 (2009).

efficiency. The Court has, relative to other courts in New South Wales, minimal delay and backlog, and high clearance rates and productivity.¹⁴⁶ Specialized environmental courts are better positioned to move more quickly through complex environmental cases, achieve efficiencies and reduce the overall costs of litigation. Environmental courts can relieve backlog in other courts by separating from the body of pending cases, and then resolving more efficiently, matters involving environmental issues.¹⁴⁷

10. Unifying ethos and mission

Rationalization and specialization give an organic coherence to the Court and its work. The nature of environmental law gives a unifying ethos and mission. As Lord Woolf has said: “The primary focus of environmental law is not on the protection of private rights but on the protection of the environment for the public in general.”¹⁴⁸

Court personnel (judges, commissioners, registrars and court staff) all believe they are engaged in an important and worthwhile endeavor and that the Court and its work matter and are making a difference. They view themselves as part of a team, not as individuals working independently. There is an *esprit de corps*. The users, legal representatives, and experts also share in this spirit and mission.

11. Value-adding function

The Court’s decisions and work have generated value apart from the particular case or task involved. First, the Court’s decisions uphold, interpret, and explicate environmental laws and

146. See ANNUAL REVIEW 2010, *supra* note 52, at ch. 5.

147. U.N. ENVIRONMENT PROGRAMME, JUDICIAL TRAINING MODULES ON ENVIRONMENTAL LAW: APPLICATION OF ENVIRONMENTAL LAW BY NATIONAL COURTS AND TRIBUNALS 179–180 (2007).

148. Sir Harry Woolf, *Are the Judiciary Environmentally Myopic?*, 4 J. ENVTL. L. 1, 4 (1992).

values.¹⁴⁹ The Court adds flesh to the skeletal form of environmental laws.

Secondly, in merits review appeals, court decisions can add value to administrative decision-making by formulating and applying principles. The principles derive from the case at hand, but can be of more general applicability. This involves rulemaking by adjudication and is distinguishable from legislative rulemaking. Courts undertaking merits review can add value to administrative decision-making by extrapolating principles from the cases that come before them and publicizing these to the target audience, who can apply them in future administrative decision-making.¹⁵⁰

The benefits of adopting principles are similar to the benefits of government agencies adopting guiding policies. Decision-making is facilitated by the guidance given by the principles. The integrity of decision-making in particular cases is better assured if decisions can be tested against the principles. Application of the principles can diminish inconsistency and “enhance the sense of satisfaction with the fairness and continuity of the administrative process.”¹⁵¹

The Court has recognized the value-adding benefits of principles in merits review appeals and has encouraged, in appropriate cases, the formulation and dissemination of planning principles in planning appeals¹⁵² and tree dispute principles in

149. See Brian J. Preston, *The Art of Judging Environmental Disputes*, 12 S. CROSS U. L. REV. 103 (2008), available at [http://www.lawlink.nsw.gov.au/lawlink/lec/ll_ Lec.nsf/vwFiles/Paper_30Oct08_PrestonCJ.pdf/\\$file/Paper_30Oct08_PrestonCJ.pdf](http://www.lawlink.nsw.gov.au/lawlink/lec/ll_ Lec.nsf/vwFiles/Paper_30Oct08_PrestonCJ.pdf/$file/Paper_30Oct08_PrestonCJ.pdf); Brian J. Preston, *Leadership by the Courts in Achieving Sustainability*, 27 ENVTL. & PLAN. L.J. 321, 321–328 (2010), available at [http://www.lawlink.nsw.gov.au/lawlink/lec/ll_ Lec.nsf/vwFiles/Paper_1Oct09_PrestonCJ_Sustainability.pdf/\\$file/Paper_1Oct09_PrestonCJ_Sustainability.pdf](http://www.lawlink.nsw.gov.au/lawlink/lec/ll_ Lec.nsf/vwFiles/Paper_1Oct09_PrestonCJ_Sustainability.pdf/$file/Paper_1Oct09_PrestonCJ_Sustainability.pdf).

150. Robin Creyke, *The Special Place of Tribunals in the System of Justice: How Can Tribunals Make a Difference?*, 15 PUB. L. REV. 220, 234 (2004); Linda Pearson, *Policy, Principles, & Guidance: Tribunal Rule Making*, 23 PUB. L. REV. (forthcoming 2012).

151. *Drake v. Minister for Immigration & Ethnic Affairs (No 2)* (1979), 2 ALD 634, 640 (Austl.); see also Brian J. Preston, *Climate Change in the Courts*, 36 MONASH U. L. REV. 15, 49 (2010).

152. Planning appeals are made against decisions under the *Environmental Planning and Assessment Act 1979* (NSW) (Austl.).

tree applications.¹⁵³ The Court has developed forty-three planning principles to date,¹⁵⁴ including two relating to ecologically sustainable development.¹⁵⁵ Tree dispute principles are similar in nature to planning principles but are more specific in addressing aspects of tree disputes.¹⁵⁶

Thirdly, the Court has also been an innovator and national leader in court practices and procedures, including eCourt case management; expert evidence including court-directed joint conferencing and reporting, concurrent evidence and parties' single experts; and on-site hearings and taking evidence on-site.¹⁵⁷ Other courts have followed the Court's lead.

153. Tree applications are made under the *Trees (Disputes Between Neighbours) Act 2006* (NSW) (Austl.).

154. See Land & Env't Ct. of N.S.W., *Planning Principles*, http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_planningprinciples; see also Peter Williams, *The Land and Environment Court's Planning Principles: Relationship with Planning Theory and Practice*, 22 ENVTL. & PLAN. L.J. 401 (2005); David Galpin, *Planning Principles: Policy-making by the Land and Environment Court*, 11 LOC. GOV'T L.J. 94 (2005); Clifford Ireland, *Planning Merits Review and the Doctrine of Precedent*, 27 AUSTL. B. REV. 231 (2006) (discussing the Court's planning principles); see also Daniel Scharf, *Not Just Individual Merits*, 2 J. PLAN. & ENV'T L. 939 (2006) (regarding the benefit of promoting consistency in planning decisions).

155. See generally *BGP Props. Pty Ltd. v. Lake Macquarie City Council* (2004), NSWLEC 399 (Austl.) (discussing ecologically sustainable development generally); see also *Telstra Corporation Ltd. v. Hornsby Shire Council* (2006), 67 NSWLR 256 (Austl.) (discussing ecologically sustainable development and the precautionary principle).

156. See *Tree (Disputes Between Neighbours) Act 2006* (NSW) (Austl.); Land & Env't Ct. of N.S.W.: *Tree Dispute Principles Published by the Court*, http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_tree_dispute_principles.

157. Concurrent evidence involves the calling of the parties' expert witnesses, grouped in their areas of expertise, to give evidence effectively at the same time at the hearing. The concurrent experts are usually directed to confer before the hearing and provide a joint report to the court on the matters on which they agree, the matters on which they disagree and the reasons for disagreement. The areas of disagreement usually provide the agenda for the oral evidence at the hearing. Concurrent evidence is essentially a structured discussion between the parties' experts, chaired by the judge, allowing the experts to give their opinions freely and respond directly to each other, with appropriate questioning, including cross-examination, by the lawyers for the parties. Peter McClellan, Chief Judge., N.S.W. Land & Env't Ct., *Expert Witnesses – The Experience of the Land & Environment Court of New South Wales*, Address at the XIX Biennial LAWASIA Conference (Mar. 20, 2005), available at http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/

Fourthly, the Court is also the first court in the world to adopt and implement the International Framework for Court Excellence. The framework is derived from the collected experience of courts in Australasia, Canada, the United States, Singapore, and Europe as a management improvement methodology. The Court assessed its performance by reference to internationally recognized court values and to seven generic areas of court excellence. After assessing its performance, the Court developed – and is implementing – a comprehensive program of action to improve its performance in each of these areas of court excellence. The Court has publicized its experience.¹⁵⁸ Other courts in Australia and overseas are drawing on the Court’s experience in undertaking their own journey towards court excellence.

12. Flexibility and innovation

Large, established courts can be conservative and have inertia; change is slow and resisted. The fact that this Court is a separate court has enabled flexibility and innovation. Changes to practices and procedure could be achieved quickly and with wide support within the institution. The Court’s Practice Notes

Speech_20Mar05_McClellan.pdf/\$file/Speech_20Mar05_McClellan.pdf; Peter McClellan, *New Method with Experts – Concurrent Evidence*, 3 J. CT. INNOVATION 259, 264 (2010); see also Gary Edmond, *Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure*, 72 LAW & CONTEMP. PROBS. 159 (2009). In the Land and Environment Court, concurrent evidence is the default procedure for all cases requiring evidence from more than one expert in the same field. See, e.g., Land & Env’t Ct. of N.S.W., Practice Note, Class 1 Development Appeals, *supra* note 126, at ¶ 56; Land & Env’t Ct. of N.S.W., Practice Note, Class 4 Proceedings, *supra* note 127, at ¶ 48.

158. See Honorable Justice Brian J. Preston, Implementing the International Framework for Court Excellence: The Experience of the Land and Environment Court of New South Wales, Address at the Asia Pacific Courts Conference (Oct. 4, 2010), available at [http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Paper_05Oct10_PrestonCJ_APCC.pdf/\\$file/Paper_05Oct10_PrestonCJ_APCC.pdf](http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Paper_05Oct10_PrestonCJ_APCC.pdf/$file/Paper_05Oct10_PrestonCJ_APCC.pdf); see also Honorable Justice Brian J. Preston, International Quality Framework in Operation at the Land and Environment Court of New South Wales, Address at the AIJA Court Administrators’ Conference, Australian Courts: Serving Democracy and its Publics (Oct. 6, 2011), available at [http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Paper_CJPreston_6Oct11.pdf/\\$file/Paper_CJPreston_6Oct11.pdf](http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/vwFiles/Paper_CJPreston_6Oct11.pdf/$file/Paper_CJPreston_6Oct11.pdf).

exemplify the Court's ability to adapt quickly and appropriately its practices and procedures.

VII. CONCLUSION

The Court is undoubtedly a model of a successful environment court. It is long established – now over thirty years. It has a preeminent international and national reputation. It has received many favorable reviews¹⁵⁹ and been a basis for recommendations for an environment court around the world.¹⁶⁰ However, the Court cannot rest on its laurels. As Gething observes, “an excellent organisation is one that is continually looking, learning, changing and improving towards the concept of excellence it has set for itself. Excellence is more of a journey than a static destination.”¹⁶¹ The Court recognizes this need for adaptive management. It continues to monitor its performance against the objectives of court administration – equity, efficiency and effectiveness. It adjusts its procedural and substantive goals and performance in response to the monitoring data. It continues to adapt to meet the environmental challenges of the future.

159. One recent example is the global study by GEORGE PRING & CATHERINE PRING, *THE ACCESS INITIATIVE, WORLD RESOURCES INSTITUTE, GREENING JUSTICE, CREATING AND IMPROVING ENVIRONMENTAL COURTS AND TRIBUNALS* (2009).

160. In 2010, both Kenya and India established specialized environment courts drawing on the experience of the Land and Environment Court of New South Wales. In August 2010, the new constitution of Kenya established a superior court of High Court status to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. CONSTITUTION, art. 162(2) (2010) (Kenya). This builds on earlier initiatives to establish a National Environment Tribunal and a Land and Environment Division of the High Court of Kenya, both in turn also inspired by the Land and Environment Court of NSW. In October 2010, India established a National Green Tribunal, drawing on the Land and Environment Court model, with Judges and expert Commissioners. See National Green Tribunal Act, No. 19 of 2010, INDIA CODE (2010), vol. 25.

161. Michael Gething, *A Pathway to Excellence for a Court – Part 1: Defining the Pathway*, 17 J. JUD. ADMIN. 237, 242 (2008).